

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 AT TACOMA

4 UNITED STATES OF AMERICA,) Docket No. CR15-5351RJB
5 Plaintiff,) Tacoma, Washington
6 vs.) December 14, 2015
7 JAY MICHAUD,)
8 Defendant.) CORRECTED TRANSCRIPT
9

10
11 TRANSCRIPT OF PROCEEDINGS
12 BEFORE THE HONORABLE ROBERT J. BRYAN
13 SENIOR UNITED STATES DISTRICT COURT JUDGE

14 APPEARANCES:

15 For the Plaintiff: KEITH BECKER
16 ANDRE PENALVER
17 U.S. Department of Justice
18 1400 New York Avenue NW, 6th Floor
19 Washington, DC 20530

20 For the Defendant: COLIN FIEMAN
21 LINDA SULLIVAN
22 Office of the Public Defender
23 1331 Broadway, Suite 400
24 Tacoma, Washington 98402

25 Court Reporter: Teri Hendrix
Union Station Courthouse, Rm 3130
1717 Pacific Avenue
Tacoma, Washington 98402
(253) 882-3831

Proceedings recorded by mechanical stenography, transcript
produced by Reporter on computer.

1 Monday, December 14, 2015 - 10:30 a.m.

2 (Defendant present.)

3 THE CLERK: All rise. This United States District
4 Court is now in session, the Honorable Robert J. Bryan
5 presiding.

6 THE COURT: Please be seated. Good morning.

7 This is United States versus Jay Michaud, No. 15-5351. It
8 comes on for argument today on the defendant's motion to
9 compel. The defendant is present with his attorneys,
10 Ms. Sullivan and Mr. Fieman. And is it Mr. Becker for the
11 government?

12 In preparation for this hearing, I have read the motion
13 and memorandum in support of the motion, and the government's
14 response and the defendant's reply. I have also looked at the
15 motion to dismiss the indictment, which was referenced in the
16 pleadings. So I think we are ready to proceed here.

17 Okay, Mr. Fieman, this is your motion, you may proceed.
18 It is my understanding that a good part of the original motion
19 has been resolved.

20 MR. FIEMAN: Yes, thank you, Your Honor.

21 As indicated in my responsive pleading, the government
22 notified us on Thursday that they were in fact willing to turn
23 over the NIT code, which we appreciate. That, I think,
24 resolves a significant portion of what we were prepared to
25 address today. And just to update the government as well, we

1 are in the process of retaining an expert on code analysis and
2 expect that that part of the discovery will proceed smoothly.
3 So, Your Honor, what we really have left is a couple of
4 issues, which are still significant. I would like to address
5 those.

6 The first remaining category of discovery that is still
7 outstanding is information regarding the extent of the
8 distribution of child pornography while the FBI was operating
9 the website. I do think it is an important distinction here.
10 I notice in the government's responsive reply at page 12, that
11 they characterize the situation as one where the government
12 allows the website to continue operating for what they
13 characterize as a brief 14-day period. I am not sure 14 days
14 is all that brief. But really my main concern is we are not
15 dealing with a situation where -- for example, the website was
16 under surveillance, and the FBI was developing probable cause
17 or inquiring into the investigation, watching the activities
18 of others. This was not a situation where they allowed the
19 website to continue; they actively operated and took control
20 of it. So there's a certain amount of ownership here that
21 that sort of passive plan does not capture, and I think it's
22 certainly important for understanding the thrust of our motion
23 to dismiss the indictment.

24 Once the FBI took control of the server on February 19th,
25 they owned it. They had the choice of shutting it down at

1 that point, investigating through whatever records were
2 already in the server. They also had the choice, for example,
3 to continue to operate it but blocking access to the actual
4 illicit content.

5 We have seen other cases where they have left certain
6 links or descriptions up, or suggestive material, but have
7 blocked user's ability to actually download or view the
8 illegal content. So this is really a bird of a different
9 feather, because during that entire 14-day period that this
10 was in fact an FBI website, there was continuous posting and
11 distribution and redistribution of child pornography. And I
12 do believe that's unprecedented, at least in my experience.

13 And I would note, Your Honor, that in terms of the
14 legality of this whole thing, and not to start arguing the
15 motion to dismiss, but really just in terms of why we are
16 seeking information about the extent of this distribution is
17 because there are a number of legal permissions which preclude
18 the government from doing this.

19 In fact, one of them was cited, and I overlooked it
20 previously in the government's briefing, at page 4, note 2,
21 under 18 U.S.C. 3509(m), the government is supposed to retain
22 custody and control of any child pornography that is seized
23 during an investigation. And of course that's not at all what
24 happened here.

25 So Your Honor, I really defer to the Court on this,

1 because ultimately what we are driving at is we want a factual
2 basis to support our motion. And really the question is, how
3 much does the Court need?

4 The undisputed facts I think at this point are that there
5 were over 200,000 members on this site; that tens of
6 thousands -- I estimated approximately 80,000 visits were paid
7 to the site during the period that it was under FBI control.
8 And we have used various adjectives or numbers to describe the
9 quantity of child pornography that was available in various
10 subdirectories, subforms on the site as being thousands of
11 images, a massive quantity of images, massive quantity of
12 videos.

13 I think in terms of the extent of distribution, the Court
14 could safely assume from all that that it was indeed a massive
15 quantity of illicit content. But our main thrust in terms of
16 getting more exact figures, if the Court is going to make
17 findings about how extensive this operation was and the
18 degree, we submit, to which the government was violating the
19 law in various respects, it may be important to have a more
20 specific count, and that information in terms of how many
21 people actually visit the site. And we know that many people
22 probably visit that site but did not necessarily look at
23 content, illicit content.

24 And it is really up to the government at this point I
25 think to choose their poison. If they want to disclose the

1 numbers of people who actually went into the various
2 subdirectories to look at content, and how many visitors were
3 doing that, I think that may be helpful. Otherwise I am more
4 than happy to stand on the assumption that there was a massive
5 amount of material distributed.

6 What I do not want to happen, though, and what I'd ask the
7 Court to one way or another foreclose, is to get to the
8 suppression hearing and potentially having witnesses for the
9 government trying to minimize how much content was
10 circulating, because I don't think from what we've just seen,
11 in terms of the characterizations in the government's own
12 pleadings, that it was a minimal amount of illicit content.

13 If the government does not want to essentially concede or
14 stipulate that there were tens of thousands of visitors, and
15 that there was a massive quantity of child pornography in
16 circulation, I do think we need more specific information.

17 Now, Your Honor, again, going on to the remaining issues,
18 the government's memoranda and sort of internal assessment --
19 assessment of both the legality of running an undercover
20 online operation like this, and also the Rule 41 issues,
21 whether the NIT warrant in particular was legal, it is again
22 in some sense the government's choice here. And we seem to be
23 viewing the same facts in a slightly different perspective.

24 I believe -- and I don't want to speak for the government,
25 but what I believe from their pleadings is that they are

1 taking the position that the fact that there was internal
2 Department of Justice or FBI counsel review of the NIT warrant
3 is relevant to the good faith analysis in terms of the
4 exception to the suppression rule. And as a legal principle,
5 that is correct, it would normally be the case.

6 But we are in a slightly different situation here because
7 one of our primary suppression arguments is specific to Rule
8 41 issues, and that is whether there was a deliberate
9 disregard of the law or Rule 41, specifically. And that has
10 nothing to do with the good faith exception. It is just
11 whether or not the government knowingly proceeded to submit a
12 warrant application that it was aware was inconsistent with
13 the law.

14 Now, I believe again from the submissions that we've made
15 to the Court, and what is publicly available in terms of DOJ's
16 own analysis of the scope of Rule 41 and the sensitivity of
17 online undercover operations, that we have enough in the
18 record to say that there's no way that this was some sort of
19 rogue operation, or DOJ did not make a conscious choice to
20 pursue the NIT warrants despite the fact that at best the Rule
21 41 arguments that have been offered in justification of that
22 warrant are questionable.

23 Now, then the question is again, what are we going to see
24 at the suppression hearing? It is simply a matter that the
25 NIT warrant in particular, and the whole website operation,

1 continued operation by the FBI, were the various points
2 reviewed and approved internally? We can take that as a
3 given. Frankly, I believe that helps our argument. That
4 establishes the deliberate nature of the actions. And then it
5 is up to the Court to determine whether they were legal or
6 not.

7 What I don't want to happen is for the government then to
8 put up witnesses to start talking about that internal process,
9 as they characterize them, consultations, in an effort to
10 persuade the Court, well, a certain number of DOJ attorneys
11 signed off on this, Your Honor, and therefore it must be
12 legal.

13 And if we are going to start drifting in that direction,
14 then I would be very much surprised, given what we know about
15 DOJ's own analysis of Rule 41, that there wasn't some dissent
16 or discord or other things going on in that consultation
17 process that we should be allowed to explore.

18 If that is where the government is heading for purposes of
19 the suppression hearing, then as we submitted in our reply
20 briefing, that seems to me to be a waiver of any privileges
21 that they are claiming.

22 So Your Honor, I really think at this point, having
23 resolved the programming code issue, our request is to put it
24 to the government, a choice on these two issues.

25 One, if there isn't going to be any disagreement that

1 there were tens of thousands of users accessing child
2 pornography through the various subdirectories, and that a
3 very large -- a massive amount of illicit content was
4 distributed, and the Court deems that sufficient to make
5 findings, then we can probably leave it at that.

6 If there's going to be any issue about the scope of it, or
7 if the Court believes more specific numbers are needed, then
8 we'd ask the Court to grant our motion.

9 I would just note, I think we addressed this briefly, we
10 cannot get that information, at least as far as -- from the
11 virtual website, at least as far as I was able to explore what
12 was on there and what was told to me by the FBI agent and the
13 AUSA, who were in the room with us, which is basically what
14 you see is what is available through this virtual website.
15 Most or all the information we are seeking is on the
16 government's server behind the website. We do not have access
17 to that.

18 And then the same choice that I indicated comes to this
19 issue of the internal consultations. There was simply an
20 approval process for this entire operation and the NIT
21 warrant. I do not think we will next -- we will need more
22 discovery on that if there's going to be any attempt by the
23 government, either in its responsive briefing or at the
24 hearing, to suggest -- to go into the details of the
25 consultations to suggest that that is somewhere out under --

1 reenforces or underscores the legality of what we are
2 challenging, then we feel we are entitled to full disclosure
3 of all those internal consultations.

4 Thank you, Judge.

5 THE COURT: Thank you, counsel.

6 Mr. Becker.

7 MR. BECKER: Thank you, Your Honor.

8 May it please the Court, I think a bit lost here in the
9 argument to this point is the legal background pertaining to
10 Rule 16 and criminal discovery, and then the good faith
11 exception, which is really the premise on which the defense
12 makes its other request.

13 The defendant's motion here really seeks to turn the
14 criminal discovery process on its head. By requesting
15 information that is not material to his defense of the actual
16 charges in this case, information that is specifically
17 exempted from production by Rule 16 itself, and on a theory
18 that has been -- a theory of discovery that has been
19 specifically rejected by the Supreme Court.

20 So let me go through with that first. As the Court is
21 well aware, discovery pursuant to Rule 16 must be material to
22 a defendant's defense. It is the defendant's obligation to
23 set forth specific facts to show that materiality. Rule
24 16(a)(2) specifically excludes the discovery or inspection of
25 reports, memoranda, or other internal government documents

1 made by an attorney for the government or other government
2 agent in connection with investigating or prosecuting the
3 case. That rule is amplified by the Supreme Court's decision
4 in *United States v. Armstrong*, which we cited in our
5 responsive briefing.

6 In that case the Supreme Court interpreted Rule 16 in a
7 way that forecloses the sort of requests for internal
8 government memoranda and deliberations that are being made
9 here. The Supreme Court interpreted defense, under Rule 16,
10 to be limited to claims that refute the government's arguments
11 that the defendant committed the crimes charged. Defense
12 means defense on the merits, a defense to the evidence that is
13 going to be presented by the government at trial pertaining to
14 him.

15 In *Armstrong*, the defendant raised a selective prosecution
16 claim similar to the sort of motion to dismiss based on this
17 allegation about outrageous government conduct, as made here,
18 and requested discovery about the government's prosecutor's
19 strategy.

20 THE COURT: You don't think that the question of
21 outrageous government conduct, if not granted on a motion,
22 would not be presented to a jury at trial?

23 MR. BECKER: I don't believe that it could be, Your
24 Honor. It is not a merits defense. And I don't believe it is
25 the sort of defense that could be submitted to a jury at

1 trial, nor has the defendant suggested that or submitted any
2 sort of briefing making that argument that I know of.

3 Now, of course, we haven't yet had our opportunity to
4 respond to the defendant's motion to dismiss. That response
5 is due on the 21st. We will respond on the merits of that
6 claim.

7 THE COURT: I am thinking ahead to the trial, and if
8 that is not a legal defense to be presented to a jury, it
9 might, in the hands of a good lawyer, lead to a jury
10 nullification, if not an argument to -- you know, the jury
11 could decide this is just unfair and determine not to convict.

12 MR. BECKER: Those seem like good reasons for the
13 Court to properly instruct the jury not to consider those
14 sorts of arguments or those sorts of considerations, Your
15 Honor, which are not merit defenses here.

16 The defendant is charged with receiving and possessing
17 child pornography. And ultimately the fact that the website
18 that he accessed was under government control, at "a" time
19 when he accessed it, and of course the defendant accessed that
20 website and registered on it long before the government seized
21 it. But the mere fact that the defendant also accessed the
22 website while it was under government control, it has no
23 bearing whatsoever on the merits of receipt and possession
24 charges based upon information found on his computer pursuant
25 to a search.

1 The motion to dismiss the indictment here, we would argue,
2 is so totally separate and apart from any sort of merits
3 defense. But even in that event, Your Honor, I want to bring
4 us back to the legal framework, because I really do believe
5 that *Armstrong* forecloses these sorts of requests. But even
6 if we look at the request -- I can quote particular language
7 from *Armstrong* if the Court thinks it is helpful. It is 517
8 United States 456, pages 462 and 463. In rejecting the
9 defense argument in that case, the Supreme Court stated
10 "because we conclude that in the context of Rule 16 the
11 'defendant's defense' means the defendant's response to the
12 government's case-in-chief. While it might be argued that as
13 a general matter, the concept of a 'defense' includes any
14 claim that is a 'sword' challenging the prosecution's conduct
15 of the case, the term may encompass only the narrower class of
16 'shield' claims, which refute the government's arguments that
17 the defendant committed the crime charged."

18 So I won't belabor that point any further, Your Honor, but
19 that's the Supreme Court very directly saying defense means
20 what evidence is presented at trial and how are you defending
21 against it, not an attack on the conduct of a government
22 investigation generally.

23 Now, in terms of the seizure of the website, first let's
24 get some facts correct. The FBI -- the government did not
25 create this particular website at issue. It operated for six

1 months before it was seized by law enforcement. It operated
2 for another two weeks under law enforcement control.

3 Now, I don't believe that a policy argument about whether
4 or not the government should interdict particular criminal
5 activity by particular criminals is relevant and that it in
6 fact brings to bear some potential serious separation of
7 powers issues in terms of the government's discretion to
8 investigate particular criminals using particular
9 court-authorized investigative techniques.

10 But that aside, this is not something the government
11 created. And if we are going to talk about the reasons why
12 this happened, is it possible that the government could have
13 shut that website down the day it was seized? Yes, of course
14 that's possible. But that ignores the rest of the context of
15 how this site operated.

16 This was a site that was created by its users. It is an
17 online bulletin board. It is helpful, I think, in
18 understanding that to think of an offline bulletin board, just
19 how does a regular bulletin board work? It is set up and
20 placed on a wall by some administrator. Then the users are
21 responsible for posting messages onto it and replying to those
22 messages. The users post messages and content within the
23 context of whatever categories are set up by the person who
24 first sets up that bulletin board. User-provided content,
25 that is how this works.

1 So it was and is the users of this particular website, in
2 the online context, who populated its content with messages,
3 including messages that had images and videos of child
4 pornography in them, and also messages that provided links,
5 that is online links to other places on the Internet where its
6 users could go and download child pornography using passwords
7 provided by the users of the site. So the child pornography
8 that was trafficked on this site was user-created and
9 user-tracked.

10 I think the use of the term "distribution" is loose and
11 not specific enough to the context here of a website whose
12 content was user-populated.

13 So again, there's no dispute here that as of the time the
14 government seized the site, and for the next two weeks, it was
15 possible and users did, like Mr. Michaud, access child
16 pornography through that website. That is not in dispute and
17 won't be in dispute at any hearing on the motion to dismiss.

18 The defense is well aware of this. They have filed their
19 motion to dismiss largely based upon that premise. And we
20 don't believe that further discovery of the users, of other
21 users than the defendant, is necessary in order to make that
22 sort of argument, to the extent that information about other
23 users and whether they downloaded images or not is even
24 attainable. Of course, again, if we don't define our terms we
25 end up in a difficult situation. Users might save child

1 pornography that they accessed on their screen. They might go
2 to another website and download it or not.

3 We are not disputing -- the government is not disputing
4 that child pornography was accessible during the period that
5 the site was operated. We don't think, and absent a finding
6 by Your Honor, that further information is necessary.

7 THE COURT: Do you have -- what they asked for here
8 was, as I understand it, the total number of pictures and
9 videos that were downloaded and distributed, and the number of
10 visitors to the site during the subject time. Is that
11 information you have?

12 MR. BECKER: The number of visitors to the site
13 during that time period is information that we would have.

14 THE COURT: Why don't you give it to them; what's the
15 difference?

16 MR. BECKER: The difference, we don't believe that it
17 is relevant and material in the case, Your Honor. That's our
18 position. That information is available.

19 THE COURT: I am always suspect of a government
20 lawyer that says something is not material or relevant to the
21 defense. You are not in a very good position to determine
22 that question. You have to put yourself in their mind. You
23 have to come to that question with the mind and background of
24 a seasoned criminal defense lawyer to make that determination.

25 MR. BECKER: Well, here, Your Honor, the

1 determination is in the context of a specific motion that has
2 already been filed for specific reasons.

3 I certainly understand the difficulty in a prosecutor
4 taking the mind-set of a defense counsel. But we are not
5 exactly in that context here. The defense says this is
6 relevant to the motion they have already filed, which already
7 alleges outrageous government conduct based on information and
8 actions they know occurred, which is that the government
9 seized and continued to operate the website for two weeks, and
10 that child pornography continued to be available.

11 So I absolutely understand Your Honor's admonition on that
12 point, but I do think the context of this request makes it a
13 bit different.

14 That said, if the Court finds that we should provide the
15 number of visitors to the site, we can provide that
16 information. We will comply with the Court's order.

17 THE COURT: Do you have also the total number of
18 pictures and videos that were downloaded or distributed from
19 that website?

20 MR. BECKER: That information is not available for a
21 variety of reasons, Your Honor, that have to do with how the
22 site operates and how individual users could have and would
23 have used it.

24 So when I access a web page, there are innumerable ways in
25 which I might save that material to my computer. I might

1 right click a picture and click "save." I might take a screen
2 shot of a particular image and save it that way, similar to
3 taking a picture of your computer screen.

4 There's just not a way for the government to give an
5 accurate count of exactly how each user interacted with the
6 site and to what extent the user saved images that were
7 available.

8 Further, because of the way the administrator set this
9 site up, there were links available to external websites that
10 contained child pornography, which the users could then go to
11 and download from. Those external websites were not within
12 government control, and so we are not able to provide
13 information as to what an individual user might have done with
14 those sorts of images or videos.

15 THE COURT: You know, Mr. Becker, I might say if this
16 was only this defendant and the argument was outrageous
17 government conduct, it would be a much different argument than
18 if this was 10,000 people, in terms of whether it was
19 outrageous or not.

20 I mean, it's one thing to go after one person that you
21 think is committing a crime, and something different to go
22 after everybody under the sun under the same premise.

23 MR. BECKER: Your Honor, respectfully, I am not sure
24 that I follow that rationale, because if there's one person
25 committing a crime, or 10,000 people committing crimes, we, as

1 the government, have an obligation to investigate all 10,000,
2 not just one.

3 So I think it is a logical fallacy to say here that
4 somehow it is the government's fault that thousands of
5 criminals gathered at this website to exploit children via the
6 trafficking of child pornography. The government did not
7 create that. The government responded to this massive website
8 trafficking in criminal activity in order to try to actually
9 find, identify, and bring to justice the people who were using
10 it criminally. And so --

11 THE COURT: How many people have you charged in this,
12 off of this website?

13 MR. BECKER: I can provide that information, Your
14 Honor. I am leery of providing that information in a public
15 forum given the ongoing nature of the investigation, but I do
16 have numbers that I can provide to the Court.

17 But again, my point is, Judge, this was a massive scope of
18 criminal activity which required the government's response
19 here. It is hard, I think, to say to prosecutors and agents
20 who see users gathering in such a massive scale in a way that
21 makes -- and for the record, we are talking about the
22 anonymous Tor network here. They are gathering in a means and
23 a way that makes their identification extremely difficult.

24 So could the government have just shut that website down
25 as soon as it was seized? That is possible. That is one

1 thing the government can do. And what happens next? All of
2 those criminal users, who are using this website in order to
3 traffic in child pornography amongst themselves, simply go and
4 set up another website and continue to engage in the exact
5 same behavior that continues to exploit children in the same
6 way.

7 The only way for the government to actually stop this sort
8 of conduct is to take action, to identify and apprehend the
9 perpetrators. That is what the government did in this case.
10 The government explained that to the judges who authorized the
11 techniques, both in the network investigative technique
12 affidavit and in the wiretap affidavit pertinent to the
13 investigation.

14 It is unfortunate that there are so many thousands of
15 criminals who act similarly, but that is not attributable to
16 the government. That is attributable to the criminals who
17 engage in that behavior.

18 I apologize, Your Honor, if my tone is too forceful. I
19 have only appeared in your courtroom twice, Your Honor. This
20 is what I do. It is obviously something that I am
21 particularly passionate about as a prosecutor. I mean no
22 disrespect whatsoever to the Court.

23 THE COURT: I understand, Mr. Becker. The other side
24 of that coin obviously is that investigations have to be
25 within the limits of the Constitution, no matter how bad the

1 crime is.

2 MR. BECKER: Absolutely, Judge. Absolutely. And
3 here the NIT was authorized by a magistrate; the wiretap was
4 authorized by a United States District Court judge with full
5 knowledge and understanding of the overall investigative
6 strategy.

7 THE COURT: Okay, go ahead.

8 MR. BECKER: So I will move, Judge, to the good faith
9 side and the internal government deliberative documents
10 pertaining to that.

11 So the good faith argument here is premised on law
12 enforcement's objectively reasonable reliance upon the
13 authorization of a magistrate. And the government has asked,
14 and will ask, the Court to find that the good faith exception,
15 the *Leon* exception applies.

16 The good faith exception is not based upon review of
17 internal government deliberative memos. It is based upon a
18 magistrate authorizing the NIT warrant in this case, as did
19 occur. We don't believe that in any way brings to bear
20 internal government deliberative documents.

21 We certainly do expect there would be testimony or
22 evidence that the affiant in this case consulted with an
23 Assistant United States Attorney before presenting the warrant
24 to the magistrate, as is the required procedure in every
25 single United States Attorney's office that I am aware of.

1 And I have been in about 25 different districts around the
2 country.

3 That is obviously a very different premise than anything
4 that brings to bear internal government deliberative memos.
5 So it seemed to me that what I heard today from the defense is
6 that we don't have an issue here that requires compulsion of
7 any of those memos, unless and until there was some argument
8 other than that. And I don't believe we'll be in that
9 position, or are in that position, Your Honor.

10 So I do expect evidence that the NIT warrant was submitted
11 to, approved by an Assistant U.S. Attorney. I don't expect
12 there to be any presentation that somehow there was also other
13 deliberations by the Department of Justice that bear on that
14 good faith inquiry.

15 So I am a little bit at a loss, I guess, to speak any more
16 than that, to the sort of speculative concern that that might
17 happen.

18 THE COURT: Let me ask you something here: In light
19 of the statutes that makes some things undiscoverable, if you
20 present evidence at a suppression hearing, for example, that
21 the warrant was approved by a United States Attorney, aren't
22 you opening up that whole thing, the whole thing they are
23 looking for? Or don't you have to -- if you want to protect
24 that particular statutory or rule privilege, don't you have to
25 just say here's the document, and does it pass constitutional

1 muster without a bunch of evidence about the process that it
2 went through?

3 MR. BECKER: I don't believe that is correct, Your
4 Honor. It is a well-established principle in the Ninth
5 Circuit, as elsewhere, that one of the factors in the good
6 faith analysis is whether or not a law enforcement agent
7 consulted with a prosecutor before seeking the warrant. I
8 don't believe that the mere fact that that occurred brings to
9 bear internal deliberations of government attorneys.

10 I think the only means in which, or way in which I think
11 that might bring to bear internal deliberations would be if
12 there were a *Brady* request, for example. So if the defense
13 were to request *Brady* material about whether any government
14 lawyer told the affiant that the warrant was not legal, and if
15 there were materials responsive to that request. In that
16 event we might need to disclose them.

17 But outside that context -- that sort of context, Your
18 Honor, no, just the mere factor of having checked with a
19 prosecutor doesn't then bring to bear other internal
20 deliberative memos. We just don't think that follows at all.

21 THE COURT: Why is that even relevant if there's an
22 attack on the affidavit supporting the search warrant?

23 MR. BECKER: Well, again, the Ninth Circuit has
24 identified that as one factor in the analysis. So the Court
25 will evaluate: did the law enforcement agent act in

1 objectively reasonable reliance on the authorization of the
2 magistrate? So in determining whether the law enforcement
3 agent's reliance was objectively reasonable, having run it by
4 a prosecutor, consulted with an attorney, is one factor the
5 Ninth Circuit says the Court should consider, and an important
6 factor the Ninth Circuit says this Court should consider.

7 THE COURT: That's on the other end of the analysis,
8 it sounds like. You don't get into the good faith exception
9 unless the underlying warrant was not a good warrant.

10 MR. BECKER: That's correct, Your Honor.

11 THE COURT: You are not submitting that here, are
12 you?

13 MR. BECKER: No, absolutely not, Your Honor. And
14 again, good faith only comes into play if the Court determines
15 that the warrant did fail legally.

16 We are not conceding that. This is just -- this is what
17 the defense says this particular set of information is
18 relevant to, and that's why we are arguing it in that context.

19 So Your Honor, if the Court has no further questions for
20 me, I will rest for now.

21 THE COURT: I don't.

22 MR. FIEMAN: Just briefly, Your Honor. I would like
23 to start with the last point first, in terms of how the good
24 faith argument and the deliberate violation of Rule 41 that we
25 are alleging are just going to play out at the hearing.

1 I just want to be clear on the record, because I don't
2 want to get to the hearing and have this part of our
3 presentation or our strategy come as a surprise to the
4 government, because I don't think any of us is going to be
5 well served by that.

6 In my view, if the government is electing not to turn over
7 any of the consultation materials, and they want to stand on
8 the fact that the NIT warrant was reviewed and approved at
9 some point by an Assistant United States Attorney, we'll take
10 that. Because in my firm view, they are just backing
11 themselves into a corner.

12 What we did not want was the government to come in here
13 and say, well, this was prepared by an FBI agent, and although
14 their subjective knowledge isn't really relevant and good
15 faith is based on what a reasonable author should know about
16 the law, well, Your Honor, it was reviewed by an Assistant
17 United States Attorney and therefore good faith should apply.

18 Our whole point is that DOJ has, from start to finish,
19 engaged in deliberate violations of Rule 41 and deliberate
20 violations of the law when it comes to trafficking and child
21 pornography. As long as they are going to say, yes, this is
22 the path we elected to follow, and then it is up to the Court
23 to determine whether it was legal, that's fine. But they seem
24 to be staking out a position that somehow these consultations
25 are going to help them on the good faith prong here.

1 The ultimate answer is already in our briefing. The good
2 faith exception is essentially foreclosed when it comes to
3 reliance on a warrant when the government itself is
4 responsible for the defects in the warrant. We are not
5 talking about some kind of close probable cause determination
6 where reasonable minds might differ about the facts and there
7 was an honest representation of information in the warrant
8 that the judge just happened to decide differently from a
9 reviewing judge. Our premise here is that this entire
10 operation is ripe with misleading and false statements and was
11 done in deliberate violation of the policies that DOJ has
12 about the parameters of Rule 41, and ultimately lead to what
13 appears to be an unprecedented engagement in illegal activity
14 in terms of distribution from the website.

15 That is a very unusual set of facts. And I think it is
16 very important, before we start squabbling at the suppression
17 hearing about where certain issues are going, that I at least
18 make that statement to the Court and the government about what
19 our intentions are.

20 If the government at this point wants to assert that we're
21 applying privilege and their condition is we are simply going
22 to stipulate or state that this NIT warrant was approved by a
23 DOJ attorney at some point and we leave it at that, we'll take
24 that. We'll take that, Your Honor.

25 Now, Your Honor, in terms of just -- the other points in.

1 A. Terms of the remaining disclosure about activity on the
2 site, one premise here I think we need to just put aside
3 completely is that the government keeps presenting to the
4 Court the notion that the alternative was to either shut down
5 the website or do an investigation that involved distribution
6 of child pornography. And that is simply not the case.

7 There are a lot of unanswered questions here. Why, if a
8 NIT could be deployed at any time somebody clicked on any
9 aspect of the website, including their home page, did they
10 choose to make it -- excuse me, choose to continue to
11 distribute child pornography? I mean, their whole premise is
12 there was probable cause from the time he signed on to this
13 website.

14 And one of the things we intend to explore, in terms of
15 the outrageousness of the government conduct, is that even
16 though by their own statements this investigation could take
17 place just by clicking on the various aspects of the site,
18 there's no necessity to download or distribute this content,
19 as far as I can tell from their own analysis of how probable
20 cause was supposed to operate in this case.

21 Now, of course we are challenging the very notion that you
22 have probable cause at the time of signing in because it
23 doesn't appear to be a child pornography website to an
24 uninformed viewer. But certainly we've also said there are
25 other aspects which clearly did have content. And this could

1 have been refined in such a way that they had their probable
2 cause and had deployed their NIT all properly and in a
3 suitably refined and focused manner without requiring the
4 distribution of child pornography. And that is where the
5 outrageousness truly comes in, because while I appreciate
6 Mr. Becker's passion about the importance of this
7 investigation, and I understand that, it is not as if the
8 government didn't have myriad ways to focus and narrow this,
9 as they have done in other cases.

10 That is also partly what makes this unprecedented, is that
11 they chose to do this in an extraordinarily expansive way in
12 terms of the number of targets, or potential targets, and in
13 terms of not trying to restrain what was ultimately ending out
14 on the Internet.

15 And the Court has already seen there are other
16 pronouncements about how even viewing one of these images is
17 supposed to be so damaging to the victims in these cases and
18 there truly are victims. But the question is, how do you
19 handle your resources in the course of an investigation?

20 I have never seen anything like this, and that is all
21 there is to it. I have never seen where the government has
22 just sprayed the Internet or a neighborhood or in a gun
23 investigation, a drug investigation, this kind of uncontrolled
24 dissemination of contraband. And that is really what we are
25 trying to drive at, what really is the extent of this.

1 Now, Your Honor, turning to my Exhibit 2, very briefly,
2 the October 22nd letter, I would just like to run very quickly
3 down what's outstanding at this point.

4 We asked for the number of child pornography pictures that
5 were posted on the site during the operation. That, I do not
6 believe the government can claim with a straight face they do
7 not have that information. That will be in their server.

8 That also goes to the second item, the number of videos
9 that were posted, also the number of links. I have had
10 clients who have been charged with possession of child
11 pornography for posting a link to a video, not necessarily
12 uploading the content. The government takes the view that
13 links constitute distribution. If there are links, as
14 Mr. Becker has said, those should be included in the count.
15 That information is in the government server.

16 They would also be able to tell user by user, as they did
17 with Mr. Michaud, what videos or links were viewed.

18 I understand Mr. Becker's argument about the downloading;
19 it is true, there are various ways to preserve. You can
20 screen shot. You can download. You may just view it, as the
21 Court has seen many of times, and the government will take the
22 position that viewing it is possession, because it ends up in
23 a temporary cache once it appears on the screen.

24 If they can't give us an exact number, I am sure they can
25 ballpark that. That is also going to be available in the

1 server, as I know from prior cases.

2 The number of visitors, I think the government is going to
3 give us. But I would ask for a breakdown on that, as we very
4 much clearly indicated to the Court at this point, not
5 everybody who went to that site, particularly given its home
6 page as it actually appeared at the time the FBI was operating
7 it -- I don't believe everybody was necessarily looking for
8 child pornography. They have identified various
9 subdirectories that were clearly dedicated to child
10 pornography. If they want to refine the count in that regard,
11 that's fine; that should still be extremely helpful.

12 And Your Honor, turning to page 2, we asked for a summary
13 of any measures that the FBI took to limit access or to block
14 images. My understanding at this point is that there were no
15 such measures whatsoever taken.

16 THE COURT: You refer to page 2 of --

17 MR. FIEMAN: I'm sorry -- of our October 22nd
18 discovery request letter, which is Exhibit 2, Your Honor.

19 We do not need additional discovery if the government's
20 position is that whatever the FBI allowed or uploaded during
21 that time, all of it was accessible. That kind of answers our
22 question.

23 And you know, Your Honor, there is an issue about why the
24 site was kept up and running as long as it was. They keep
25 referring to the 14-day period that the FBI was operating the

1 site is brief, and of course the Court will characterize it as
2 it sees fit.

3 I can tell you I have had clients charged for much briefer
4 interactions with websites, often amounting sometimes to only
5 a few images. So I don't know whether there was a point to
6 where DOJ came to the realization that maybe this was going
7 too far, or they simply decided they had identified enough
8 targets, but I do believe that the reasons for the duration of
9 this distribution will be relevant to the hearing.

10 And the last item, I think I have addressed, in terms of
11 the documentation regarding their internal procedures on this.

12 Your Honor, when we're talking about the typical case and
13 the typical good faith argument in the context of a probable
14 cause determination, this just isn't the typical case. From
15 what we've made out so far, there is no legal exemption for
16 what the government did here. You know, there's -- Rule 41
17 doesn't allow for this. There's no statutory exception for
18 the government to distribute child pornography in the course
19 of trying to make a case.

20 The number of people, 200,000 users, targeted from a
21 single warrant, I think is unprecedented.

22 We are dealing with a number of very unusual factors in
23 this case, and I think it is important to bear in mind that
24 while the government keeps going back to *Armstrong* and talking
25 about discovery in terms of defense at trial, we've given you

1 the Ninth Circuit law, Your Honor, which says that all
2 information that relates to pretrial motions is relevant to
3 the defense.

4 More importantly, we are not required to project our
5 strategy at trial. There are a host of issues percolating in
6 here that we intend to put before a jury. We will not --
7 obviously because we are not allowed to -- be asking for a
8 nullification instruction. But there are, if nothing else, a
9 host of issues about *res gestae* and the context of how
10 Mr. Michaud was even targeted, that are inevitably going to
11 come up in this trial, unless the government is going to
12 streamline its case to the point where they won't be able to
13 lay the foundation for a lot of their materials. This is all
14 directed onto Mr. Michaud's overall defense but the inevitable
15 issues that are going to be coming up at trial.

16 Finally, Your Honor, as indicated in our briefing,
17 materiality is a very low threshold. We just need to show
18 that this is relevant to either a pending motion or defense at
19 trial. And I think the Court has grasped kind of where we are
20 heading, that I don't need to belabor that.

21 Unless you have any questions, Your Honor, we would ask
22 for the specific relief that we requested in our motion.

23 THE COURT: Well, let me address the limitation,
24 first. Rule 16, the Federal Rules of Criminal Procedure -- it
25 is hard to cite these things because there are so many sub

1 parts. I guess it is (a)(2) of that rule provides that the
2 rule does not authorize the discovery or inspection of
3 reports, memoranda, or other internal government documents
4 made by an attorney for the government or other government
5 agent in connection with investigating or prosecuting the
6 case. It seems to me that that is a rule that binds the
7 Court.

8 And the government in responding to the order that I am
9 going to make, I think can recognize that exception and
10 obviously in good faith withhold things that come within that
11 definition. The problem with that, that I see, is that in a
12 suppression hearing, if the government withholds those
13 documents, that an agent, for example, might be able to
14 testify that he conferred with counsel. You start talking
15 about what the lawyer said, all of a sudden that's all open.
16 It is a fine line to walk. Once an agent says, well, the
17 government lawyer told me this is all good, well all of a
18 sudden that is open, it seems to me. But as I indicated, I
19 think you can withhold that information that comes within that
20 category.

21 Other than that, I think that the items requested should
22 be provided. And if they can't be specifically -- I am
23 referring to the October 22, 2015, letter to Ms. Vaughn from
24 Mr. Fieman, and I think those things should be produced by the
25 government. I think they are reasonably relative to defense

1 theory in the case and material to that theory, giving the
2 benefit of the doubt to the defendant on that question.

3 I understand that some of the specific things requested
4 may not be readily available, but as requested in that letter,
5 if the exact figures or totals are not readily available, a
6 good faith estimate of the numbers would be sufficient.

7 If specifics are not available, I think also the number of
8 charges arising from this investigation should be -- the
9 numbers, only numbers, I am saying -- should be provided to
10 the defense.

11 Is that clear enough? The motion should be granted to
12 that extent, and denied to the extent that the production
13 would run afoul of Rule 16(2).

14 MR. FIEMAN: Two quick clarifications.

15 One is, if we could get an estimate -- I understand that
16 the government may need some time to figure out how to capture
17 this, but if we could have an estimate of how much time they
18 need to keep things moving forward because we do have a
19 hearing scheduled.

20 MR. BECKER: Is the Court going to issue a written
21 order specifying what we are to provide?

22 THE COURT: Do you need one?

23 MR. BECKER: I think that would be our preference,
24 Your Honor, just so we are clear, because I think --
25 particularly with respect to the site statistics. I think I

1 understand what the Court is ordering. That last request on
2 that letter that pertained to steps taken by the government to
3 limit dissemination, we would like to be clear on what it is
4 we are to produce and by when.

5 THE COURT: Well, I will issue an order later today.

6 MR. FIEMAN: Your Honor, I'd understood that
7 basically the Court was granting everything -- that everything
8 in our October 22nd letter should be produced, with the
9 exception of the consultations and memoranda records that were
10 separately issued on one subheading, and that was with the
11 proviso that the government may actually open the door to that
12 or should avoid opening the door to that discovery at the
13 hearing.

14 THE COURT: Well, I don't need to go that far. It is
15 a matter for the trial judge, who probably will be me, but at
16 my age, who knows.

17 MR. FIEMAN: Well, Your Honor, in that case, maybe we
18 should move up the hearing; we have got a lot before the
19 Court.

20 THE COURT: Okay.

21 MR. BECKER: Judge, I guess -- I think our next
22 motion hearing is scheduled for, I believe, the 22nd of
23 January.

24 THE COURT: I think so.

25 MR. BECKER: I guess I would request the first week

1 of January in terms of providing a response. And if we can
2 provide it sooner, we'll do so. Obviously we have some
3 holidays coming up, and I do need a chance to confer with
4 supervision as to some of the aspects of the Court's order.

5 MR. FIEMAN: That will be fine, Your Honor, thank
6 you.

7 THE COURT: All right. Okay. So that would end the
8 hearing, and I will issue an order this afternoon or maybe
9 later this morning.

10 MR. FIEMAN: Thank you, Judge.

11 (Proceedings concluded.)

12
13
14 * * * * *

15 C E R T I F I C A T E

16
17 I certify that the foregoing is a correct transcript from
18 the record of proceedings in the above-entitled matter.

19
20 /S/ Teri Hendrix

December 16, 2015

21 Teri Hendrix, Court Reporter

Date